IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 303

TOWN OF BRISTOL

v.

HERK HAVOCKSEEN, ET AL.,
Appellants

APPEAL FROM THE COURT OF CHANCERY FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

ARGUMENT AND BRIEF FOR APPELLANTS

ARGUMENT DAVE SLAVITT,
Counsel for Appellants

SLAVITT AND CHAPPELL
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

TOWN OF DARIEN

vs.

HAIK KAVOOKJIAN, ET AL.,

Appellants

Opinions Below

The opinions of the Superior Court for Fairfield County, State of Connecticut (Shapiro, J.), dated September 26, 1962, and (Shannon, J.), dated May 29, 1963, may be found at pages 7 and 39 respectively of the certified record submitted herewith supplemental to the petition.

The opinion of the Supreme Court of Errors of the State of Connecticut, rendered June 16, 1964, (Shea, J.) is attached hereto as Appendix "A".

Statement of Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257(3) of Title 28 of The United States Code (as amended).

Questions Presented

1. Has the condemnor exhausted all reasonable efforts to obtain the owners' land as required by Section 48-12 of The Connecticut General Statutes, Revision of 1958, by negotiating with only one of two tenants in common and was the condemnation proceeding the taking of appellants' property without due process of law?

2. Did the Town of Darien sufficiently meet the requirements of Section 48-12 of The Connecticut General Statutes, Revision of 1958, which requires the condemnor to seek to agree with the owner or owners prior to the institution of condemnation proceedings? If not, did this failure to meet the requirements of the Statute and the subsequent actions undertaken by the Town of Darien result in the taking of appellants' property without due process of law?

3. Were the appellants denied due process of law when the Supreme Court of Errors of the State of Connecticut held as a matter of law that the public interest would be prejudiced if the Town of Darien was refused permission to immediately enter upon appellants' property according to Section 48-16 of The Connecticut General Statutes?

Constitutional and Statutory Provisions

(A) CONSTITUTIONAL PROVISION —

Appellants believe that the following constitutional provision is relevant to the case at bar:

> Amendment XIV — Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement.
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person* of life, liberty, or *property, without due process of Law*; nor deny to any person within its jurisdiction the equal protection of the laws.

(B) STATUTORY PROVISIONS —

Appellants believe that the following statutory provisions are applicable:

> Section 48-12, General Statutes of Connecticut, (Rev. 1958) VIII, 176, attached hereto as Appendix "B"

Section 48-16, General Statutes of Connecticut, (Rev. 1958), VIII, 178, attached herein as Appendix "C".

Section 48-13, General Statutes of Connecticut, (Rev. 1958), VIII, attached herein as Appendix "D".

Statement of the Case

HAIK KAVOOKJIAN and ALICE KAVOOKJIAN, husband and wife, are tenants in common of a tract of land, approximately fourteen acres, upon which there is erected a dwelling, out buildings and other improvements. The Town of Darien seeks to acquire a portion of the land, slightly over four acres, to add to another tract previously acquired as a site for the proposed construction of an elementary school.

The first Selectman of the Town of Darien discussed the plans of acquisition with Mr. Kavookjian and was informed that his property was not available for purchase by the Town. Thereafter the appellants, together with other taxpayers of the Town of Darien, instituted an action seeking injunctive relief against the town acquiring the Kavookjian and other adjoining property for a school, which action was determined adversely to the plaintiffs.

While said action was pending, the Town of Darien instituted a condemnation action against the appellants to acquire a portion of their property as hereinbefore more particularly set forth without ever making any effort to negotiate with Mrs. Kavookjian, although as of record in the office of the Town Clerk of said Town of Darien the Town had knowledge that Mrs. Kavookjian was the owner of an undivided one-half of the property in question.

The judgments of the lower Court appointed a committee to find the amount of compensation to be paid to the property owners and also entered an order giving the Town immediate possession of the premises taken. From these judgments the Kavookjians appealed to the Supreme Court of Errors, which Court sustained the judgments of the lower Court.

It is from the decision of the Supreme Court of Errors that the appellants now seek Certiorari from The United States Supreme Court.

Raising the Federal Questions

The issue of due process of law was first raised by the appellants in Paragraph 4 of their Answer to the Complaint (page 3 of the record). Said Answer raises the question of whether or not the failure of the Town of Darien to negotiate with Mrs. Kavookjian was an act of taking property of the appellants without due process of law as required by the Federal Constitution. This Federal question was expressly passed upon by the Superior Court (page 39 of the record). The answer also raises the issue of violation of the due process clause by the Town of Darien, concerning the taking of appellants' property without making a bona fide effort to agree with the owners, without stating the complete purpose for which their property was required, without informing the owners of the complete nature and location of the use to which the property acquired was to be put and without fulfilling the statutory requirements of attempting to agree pursuant to Section 48-12 of the Connecticut General Statutes, Revision of 1958.

These issues were again raised by appellants in their answer to the application of the Town for immediate possession which was passed upon by the lower Court in its determination of said application (page 7 of the record).

These issues were again raised by appellants in their brief before the Supreme Court of Errors of Connecticut. The Supreme Court decision was adverse to the appellants on the issue of the need to negotiate with both co-owners but it failed to determine the necessity of the Town to disclose the nature and location of the use to which the property was to be put, particularly with respect to the remainder of the land of the appellants.

Reference is made to Paragraphs ten through thirteen of appellants' draft findings filed with the Superior Court of The State of Connecticut of December 26, 1962 (See pages 13 and 14 of the record). In these paragraphs appellants set out the steps required to be taken by the Board of Selectmen of the Town of Darien for the acquisition of a proposed school site. The draft finding shows that the Town of Darien did not follow the statutory procedure in reference to the acquisition of the proposed school site and raises once again the issue of

whether appellants were denied due process of law under the Fourteenth Amendment of The United States Constitution. This Federal question was expressly passed upon by the Superior Court of Connecticut. (See page 59 of the record) This Federal question was again raised on appeal in appellants' assignment of errors filed on February 8, 1965, with the Superior Court of The State of Connecticut in Fairfield County and in appellants' assignment of errors filed June 27, 1963, with the Supreme Court of Errors of The State of Connecticut and they were again expressly passed upon by that Court. (See Appendix "A")

Page two of appellants' brief to the Supreme Court of Errors of The State of Connecticut raises the constitutional issue. Specific reference is made to Question One of Subsection "B" wherein the issue of whether the Town of Darien took appellants' property in violation of the due process clause of the Fourteenth Amendment of The United States Constitution is raised. Question Number Two of Subsection "B" again raises the constitutional issue of due process of law. This issue was expressly passed upon by the Supreme Court of Errors of Connecticut. (See Appendix "A")

As a result of the decision rendered by the Supreme Court of Errors of The State of Connecticut, appellants believe that the right of due process of law afforded to them under the Fourteenth Amendment of The United States Constitution was violated and therefore seek this Writ of Certiorari.

Argument

A. THE TOWN OF DARIEN DID NOT EXHAUST ALL REASONABLE EFFORTS TO OBTAIN THE OWNERS' LAND BY AGREEMENT BEFORE CONDEMNATION PROCEEDINGS WERE INSTITUTED AS REQUIRED BY SECTION 48-12 OF THE GENERAL STATUTES OF CONNECTICUT, BY NEGOTIATING WITH ONE ONLY OF TWO TENANTS IN COMMON THE TOWN OF DARIEN TOOK THE OWNERS' PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 48-12 of the General Statutes of Connecticut provides a procedure for condemning property *after* agreement to purchase the property is sought and has *failed*. It is settled law that in order to maintain condemnation proceedings it is essential that

all preliminary steps prescribed by the statute be taken for such steps are jurisdictional and may not be disregarded.

Lindsey v. Omaha, 50 Neb. 517, 46 N.W. 627 (1890).
Shannon v. Tarrant, 99 S.W. 2d 964 (Tex. 1936).
People v. Fisher, 189 App. Div. 148, 178 N.Y.S. 184 (1919).

Furthermore, where there is a statutory requirement to agree with the owner, the attempt to purchase becomes a condition precedent to condemnation proceedings. Such a procedure is mandatory and not merely discretionary and the condemnation proceedings are void if no attempt is made prior to their commencement to come to an agreement with the owner.

See: 29 C.J.S. § 224, 1164-65.
Also: *Winston-Salem v. Abbey*, 194 N.C. 588 S.E. 764 (1927).
In Re Rogers, 243 Mich. 517, 220 N.W. 808 (1928).
Portland v. Ramm, 132 Ore. 517, 285 P. 236 (1930).
Milwaukee v. Diller, 194 Wisc. 376, 216 N.W. 384 (1927).
Shirley v. Harlan, 117 Neb. 846, 223 N.W. 384 (1929).
Clements v. Ft. Worth & D.S.P. Ry. Co., 8 S.W. 2d 895 (Tex. 1928).

Mrs. Kavookjian was an owner of the property as a tenant in common with her husband.

The term owner when employed in statutes relating to eminent domain to designate the persons who are to be made parties to the proceeding refers to *all* those who have any lawful interest in the property to be condemned.

See: 18 Am. Jur. § 321, 964.
Also: *Minnesota v. United States*, 305 U.S. 382, 83 L.ed 235 (1938).
Comm'rs. of Smith Co. v. Lahoe, 37 Kan. 480 (1887).
Gerrard v. O., N. & B. H. R. R. Co., 14 Neb. 220 15 N.W. 231 (1883).

For the purpose of determining the persons entitled to the benefit of an attempted agreement to purchase the property, the

test should be the same as the test for determining the persons entitled to be parties to a condemnation proceeding as set forth in the above paragraph, that is: where there is more than one owner, then proof must be offered of inability to agree with all the owners even when the owners are tenants in common.

C. & O. N. Ry. Co. v. Barger, 10 Ohio App. 443 (1919).
Cincinnati Interurban R.R. v. Murray et al., 1 N.P.N.S. 1 (Ohio), 50 Ohio Circ. Ct. N.S. 65 (1905).

As a result of the above cited authorities it is contended that it was incumbent upon the Town of Darien to attempt to reach an agreement with Mrs. Kavookjian as required by statute before seeking to condemn the land.

C. & O. N. Ry. Co. v. Barger, 10 Ohio App. 443 (1919).
Cincinnati Interurban R.R. v. Murray et al., 1 N.P.N.S. 1 (Ohio), 50 Ohio Circ. Ct. N.S. 65 (1905).

Under Section 47-14 of The General Statutes of Connecticut: "Any interest in real property held in joint tenancy may be extinguished or conveyed to the remaining party or parties in interest by deed."

The Town of Darien never attempted to make any agreement with Mrs. Kavookjian concerning the purchase of her interest in the land. Disregarding this procedural requirement the Town of Darien proceeded to condemn Mrs. Kavookjian's interest in the land. This action was undertaken in violation of Section 48-12 of The General Statutes of Connecticut which requires an attempt to agree with the owners before condemnation proceedings are undertaken. Thus the Town of Darien by condemning Mrs. Kavookjian's interest in the land deprived her of due process of law as guaranteed by the Fourteenth Amendment of The United States Constitution.

B. THE TOWN OF DARIEN DID NOT SUFFICIENTLY MEET THE REQUIREMENTS OF SECTION 48-12 OF THE GENERAL STATUTES OF CONNECTICUT WHICH REQUIRES THE CONDEMNOR TO SEEK TO AGREE WITH THE OWNERS PRIOR TO THE INSTITUTION OF CONDEMNATION PROCEEDINGS. AS A RESULT OF THIS FAILURE TO MEET THE REQUIREMENTS OF THE STATUTE AND

THE SUBSEQUENT ACTIONS UNDERTAKEN BY THE CONDEMNOR, APPELLANTS' PROPERTY WAS TAKEN WITHOUT AFFORDING THEM DUE PROCESS OF LAW.

Section 48-12 of The General Statutes of Connecticut requires the condemnor to seek to agree with the owners of the property prior to the institution of condemnation proceedings.

Where the statute requires an attempt to agree all reasonable efforts must be instituted to reach an agreement.

Town of West Hartford v. Talcott, 138 Conn. 82, 82 A.2d 331 (1951).

In re Petition of Rogers, 243 Mich. 517, 220 N.W. 808 (1928).

Shuler v. Harlan County, 117 Neb. 846, 223 N.W. 284 (1929).

State v. Superior Court for Kitsap County, 191 Wash. 7, 70 P. 2d 990 (1938).

These efforts must be bona fide and their existence is a condition precedent to condemnation. It is mandatory and jurisdictional and not subject to waiver or estoppel.

Zeigler v. Brown, 339 Mich. 390, 63 N.W. 2d 677 (1954).

Application of Loup River Public Power Dist., 157 Neb. 652, 61 N.W. 2d 213 (1953).

In re State Highway Commissioner, 252 Mich. 116, 233 N.W. 172 (1930).

Clarke v. Big Sandy & C. R. Co., 142 Va. 512, 129 S.E. 384 (1925).

City of Long Beach v. Long Beach Water Co., 203 App. Div. 902, 205 N.Y.S. 420 (1924).

The efforts to purchase must be coupled with a reasonable effort to *induce the owner to accept*. It is not sufficient merely to make an offer. Some honest effort must be made to *attempt to convince the owner to accept the offer*.

Application of Loup River Power Dist., 157 Neb. 652, 61 N.W. 2d 213 (1953).

Furthermore, the fact that the owner of the land expresses his unwillingness to sell does not excuse the petitioner from making a reasonable effort to come to an agreement with the

landowner before instituting condemnation proceedings.

In re Petition of Rogers, 243 Mich. 517, 220 N.W. 808 (1928).

Schenectady R. Co. v. Lyon, 41 Misc. 506, 85 N.Y.S. 40 (1903).

Also: 29 C.J.S. §224, 1166.

It has been held that a perfunctory offer is insufficient to establish the requisite failure of negotiation as a condition precedent to the institution of condemnation proceedings.

In re Petition of Rogers, 243 Mich. 517, 220 N.W. 808 (1928).

New York Telephone v. Wood, 145 Misc. 481, 259 N.Y.S. 865 (1931).

State v. Superior, 194 Wash. 7, 76 P. 2d 990 (1938).

Furthermore, if there are several owners of the land, it has been held that inability to agree (negotiate) with *all* the owners must be shown.

Cincinnati Interminal R.R. v. Murray et al., 1 N.P.N.S. 1 (Ohio) (1903).

C. & O. N. Ry. Co. v. Barger, 10 Ohio App. 443, 30 Ohio Circ. Ct. N.S. 65 (1919).

It has been held that where the negotiator *fails to disclose* the *purpose for* the *taking* the result is a *failure to negotiate*.

Pittsburgh C.C. & St. Louis Ry. Co. v. Gage, 280 Ill. 639 (1917).

Fourth Cong. Church v. Board of Street Commissioners, 116 Conn. 34, 164 A. 884 (1933).

In a partial taking physical changes in the land taken which result from the contemplated improvement are a consideration in determining the owners' damages to the remainder.

See: *Andrews v. Cox*, 127 Conn. 455, 17 A. 2d. 507 (1941).

The owner is entitled to be compensated in a partial taking for the diminution in value of the remainder which will result from the taking. See: *Gaylord v. City of Bridgeport*, 90 Conn. 255, 96 A. 936 (1916); *Andrews v. Cox*, 127 Conn. 455, 17 A.

2d 507 (1941); *Lefebvre v. Cox*, 129 Conn. 262, 28 A. 2d 5 (1942); *Village of Ridgewood v. Steel Int. Corp.*, 28 N.J. 121, 145 A. 2d 306 (1958); *Della Salla v. Parking Authority of City of Hackensack*, 302 Pa. 500, 105 A. 2d 440 (1954).

Damages for land taken may include those which will result in the future from the use of the land taken to a greater extent than immediately contemplated. See: *Andrews v. Cox*, 127 Conn. 455, 17 A. 2d 507 (1941); *Lefebvre v. Cox*, 129 Conn. 262, 28 A. 2d 5 (1942).

An owner is entitled to recover for all damages, present and prospective, which may be known or may reasonably be expected to result from the construction and maintenance of the improvement. See: *State Highway Com'r. v. National Fireproofing Corporation*, 127 N.J.L. 547, 22 A. 2d 268 (1941).

In the instant case the land taken is to be used for a public school. The remainder contains the owners' home. Surely it is beyond honest disagreement to deny the fact that the location of the school building or the playground and their proximity to the home are elements in determining whether or not the value of the remainder will be diminished and to what extent. Under these circumstances it is clear that the condemning authority must acquaint the owner, in a partial taking situation, with the planned physical use and its location in order to give the owner a reasonable understanding of the extent of the damages to be used as the basis for negotiation. Furthermore, failure to do this results in a *failure* to negotiate and a violation of Section 48-32 of The General Statutes of Connecticut and due process of law. See: *Pittsburgh C.C. & St. L. R. Co. v. Gage*, 280 Ill. 639 (1917); *Fourth Cong. Church v. Board of Street Commissioners, et al.*, 116 Conn. 341, 164 A. 884 (1933). Only when informed of what was to happen to his land after it was condemned (the owner might find a playground under his bedroom window or immediately adjoining his back yard, which no one could deny, would lower the value of his remainder estate) could the owner possibly be in a position to negotiate with the Town of Darien as to the matter of damages.

The sole efforts of the Town to negotiate with Hark Kavookjian are contained in finding paragraphs 54, 58, 59 and 60

Thus it cannot be found that the Town of Darien engaged in bona fide negotiations with Alice or Haik Kavookjian as required by Section 48-12 of The General Statutes of Connecticut because:

1. The purpose for the taking was not disclosed to them in any way nor were they informed as to what would happen to the land so as to give them some idea as to the extent of the damages to their remainder so as to put them in a reasonable position to negotiate as was their right before their property was condemned.

2. No reasonable effort to reach an agreement was made by the Town of Darien as required by statute.

3. No reasonable effort to induce the owners to sell was made by the Town of Darien as required by statute.

4. No efforts were made by the Town of Darien to negotiate with *all* the owners as required by statute.

The town has taken the position that it need not have negotiated with Alice Kavookjian and need not have continued negotiations with Haik Kavookjian because they had opposed the town's right to take in a prior proceeding and the town believed that the negotiations would be fruitless. The owners did not waive the lack of efforts to negotiate by the condemnor by appearing under a separate proceeding to resist condemnation. *Nueces County v. Rankin*, 305 S.W. 2d 455 (Tex. Civ. App. 1957). See also In re Petitions of Rogers, 245 Mich. 517, 220 N.W. 808 (1928), where the owner was unwilling to sell for highway purposes. It has already been shown that where there are several owners, inability to agree with one does *not* remove the obligation of the condemnor from negotiating with the others.

Cincinnati Interurban R. Co. v. Marvin, et al., 1 N.P.N.S. 1 (Ohio) (1903).

C. & O. N. R. Co. v. Burger, 10 Ohio App. 115, 30 Ohio Cir. Ct. N.S. 65 (1919).

The Town of Darien has failed to indulge in even the most basic efforts to negotiate with these owners. Until it has done so it has no power to expropriate their land and the attempts to

do so are in violation of the Fourteenth Amendment of The United States Constitution because it is an attempt to deprive citizens of their property without due process of law.

C. APPELLANTS WERE DENIED DUE PROCESS OF LAW BY THE SUPREME COURT OF ERRORS' HOLDING AS A MATTER OF LAW THAT THE PUBLIC INTEREST WOULD BE PREJUDICED IF THE TOWN OF DARIEN WAS REFUSED PERMISSION TO IMMEDIATELY ENTER UPON APPELLANTS' PROPERTY IN ACCORDANCE WITH SECTION 48-16 OF THE GENERAL STATUTES OF CONNECTICUT

The Supreme Court of Errors of the State of Connecticut erred in reaching the conclusion that the public interest of the Town of Darien would be prejudiced by further delay in obtaining immediate possession under the provisions of Section 48-16 of The General Statutes of Connecticut relied upon by the Town of Darien. This decision resulted in a taking of appellants' property without affording them due process of law as guaranteed by the Fourteenth Amendment of The United States Constitution.

Specific reference is made to the subordinate findings contained in paragraphs 29, 38, 41, 42 and 43. (See pages 14-16 and 17 of the record.) These findings show that the Town of Darien has not yet received preliminary architectural drawings concerning the proposed use of appellants' land. Furthermore, these findings show that the Town of Darien cannot proceed with the construction of the proposed school until 1965 at the earliest.

The architects can proceed with preparing preliminary drawings without resorting to the relief sought by the Town of Darien under Section 48-16 of The General Statutes of Connecticut. That is, the information needed by the architects to begin preparing the preliminary drawings can be obtained under the provisions of Section 48-18 of the General Statutes of Connecticut (See appendix D) without resorting to Section 48-16.

Condemnation proceedings are in derogation of the common law rights of landowners, and therefore the right of condemnation should be strictly construed in favor of the landowner.

City of Middletown v. E. L. Caulkins Automobile Co., 19

Conn. Sup. 45, 109 A. 2d 888 (1954).
Algonquin Gas Transmission Co. v. North Haven Fair Assn., 20 Conn. Sup. 51, 121 A. 2d 872 (1956).
Board of Public Utilities Comrs. v. Johnson, 20 Conn. Sup. 422, 138 A. 2d 803 (1957).

Since the Town of Darien does not have the money to proceed with any phase of construction and since the preliminary drawings have not been commenced by the architects and since all necessary data desired by the architects can be obtained under Section 48-15 of The General Statutes of Connecticut, the relief granted by the Supreme Court of Errors of Connecticut under Section 48-16 was erroneous and was a taking of appellants property without due process of law.

Section 48-16 of The General Statutes of Connecticut besides granting to the condemnor the right to immediate possession also gives the condemning party the right to abandon condemnation proceedings at any time before transfer of title. *Town of Trumbull v. Ehrlam*, 148 Conn. 47, 166 A. 2d 844 (1961). Therefore, it is possible for the Town of Darien to enter upon appellants' property pursuant to Section 48-16, cause permanent damages to the property, and then abandon the property before title has passed causing the owner of the land to suffer irreparable harm. This result can be avoided pursuant to Section 48-15. This staute would supply the Town of Darien with all the pertinent information that they desire.

Section 48-15 of the General Statutes of Connecticut should control over Section 48-16 in this particular case. Since condemnation proceedings are in derogation of the common law rights of property owners they should be strictly construed in favor of the property owner. Condemnation proceedings should not be resorted to if there is a more favorable remedy. Thus, the Supreme Court of Errors by granting the town of Darien the right to immediate possession of appellant's land deprived appellants of their property without due process of law in view of the remedy available to the Town of Darien under Section 48-15. There was no necessity for the court's granting immediate possession of appellants' land. The Town of Darien did not show any necessity for the granting of immediate possession particularly in view of Section 48-15. Therefore the granting of

immediate possession to the Town of Darien deprived appellants of their property without due process of law.

Public interest will not be prejudiced by further delay in the Town's obtaining possession since the town must obtain all of the aforesaid data and instruct the architects to proceed with preliminary drawings before any construction can commence. All of this can be obtained under Section 48-13 without reference or resort to Section 48-16.

Section 48-16 of the General Statutes of Connecticut allows a court to grant the right to devote property temporarily to the business use specified in the petition for condemnation when it appears to the court's satisfaction that the public interest will be prejudiced by delay.

Town of Trumbull v. Ehrsam, 148 Conn. 47, 166 A. 2d 844 (1961).

Under the provisions of Section 48-16 the court must make a preliminary finding of fact that public interest will be prejudiced by delay.

Danbury v. Danbury Airport Corp., 9 Conn. Sup. 317 (1941).
Algonquin Gas v. Coleman, 17 Conn. Sup. 327 (1951).

In the case at bar no specific damage to the Town of Darien has been shown which would result from failure to grant possession sought pursuant to Section 48-16. Their only immediate needs appear to be the obtaining of certain information to allow the architects to proceed and this can be obtained pursuant to Section 48-13. They have not appropriated the necessary money nor even obtained the preliminary plans from the architects. Surely they cannot be prejudiced by a delay in obtaining possession of the property. However, appellants were definitely prejudiced by the Supreme Court of Errors' holding, because their property was taken from them under Section 48-16 without due process of law particularly in view of the fact that Section 48-13 was the more appropriate statute in this particular case and because of the requirement of strict interpretation of condemnation statutes in favor of the property owner.

Conclusion

It is clear from the record in the case at bar that the Town of Darien has become angered with these owners because of the position taken by them in the case of *Baker v. Kerrigan*, 149 Conn. 596 and has cast aside the rudiments of fair dealing between the condemning authority and the owner.

The Town has sought immediate possession where no need exists for it. The Town is not ready to use the property, whatever it needs for it may be.

The Town has not sought to fairly negotiate with the owners by making available to them the knowledge requisite for them to determine the damages which would result from the taking.

No condemning authority should be allowed to be presumptious with reference to the rights of its citizens and their property nor take their property without compliance with the appropriate state statutes and federal constitutional requirements.

The Town has not sought to negotiate with the owners before seeking condemnation as required by Section 48-12 of The General Statutes of Connecticut.

The appellants' land has been arbitrarily and capriciously condemned in violation of statutory principles and the basic principles of fair play and due process of law.

Respectfully Submitted,

Appellants

By: SLAVITT AND CONNERY

APPENDIX "A"

OPINION OF THE SUPREME COURT OF ERRORS
February Term, 1964

TOWN OF DARIEN v. HAIK KAVOOKJIAN ET AL.

Petition for the appointment of a committee to determine compensation for the taking of property as a site for a school, brought to the Superior Court in Fairfield County at Stamford and referred to HON. PATRICK B. O'SULLIVAN, state referee; judgment for the plaintiff on the referee's report, SHANNON, J., and appeals by the defendants from the judgment and from a prior order by the court, SHAPIRO, J., granting immediate possession. NO ERROR

ABRAHAM D. SLAVITT and ROBERT A. SLAVITT, for the appellants (defendants).

WARREN W. EGINTON, with whom were EDWARD R. McPHERSON, JR., and, on the brief, JOHN F. SPINDLER, for the appellee (plaintiff).

SHEA, J. The plaintiff brought a petition to the Superior Court for the appointment of a committee of three disinterested persons to assess just damages for the taking of land of the defendants for school purposes. In the petition, the plaintiff alleged that it had voted to acquire the defendants' land as a site for a school, that the land was necessary for that purpose, that the selectmen were authorized to take the necessary action to purchase the property or, if they were unable to agree with the owners thereof, to condemn it. The petition further alleged that the parties had been unable to agree on the purchase price of the land. The answer of the defendants put in issue all of these material allegations. The court referred the petition to a state referee, whose report, as amended, was accepted by the court, and judgment was rendered appointing a committee of three to assess damages. In the meantime, the court had granted the plaintiff's motion for permission to enter immediately upon the land under § 48-16 of the General Statutes. The defendants have appealed from the judgment and the order permitting the plaintiff to enter into immediate possession.

The defendants, Haik and Alice Kavookjian, own the property as tenants in common. Their principal claim is that the plaintiff was required to exhaust all reasonable efforts to obtain the land by agreement, that such efforts were a condition precedent to the right to take the land, and that the plaintiff failed to negotiate with Alice for the acquisition of her rights in the property. Haik concedes that there is nothing to prohibit the plaintiff from proceeding to condemn his interest in the property. Section 48-12 of the General Statutes authorizes the condemnation of land "if those desiring to take such property cannot agree with the owner upon the amount to be paid him for any property thus taken." Thus, inability to agree with the owner of property sought to be condemned is a condition precedent to condemnation under the statute. *West Hartford v. Talcott*, 138 Conn. 82, 89, 82 A.2d 351. Inability to agree may be shown by any testimony evincive of the fact. *Williams v. Hartford & N. H. R. Co.*, 13 Conn. 397, 410. The condemnor must exhaust all reasonable efforts to obtain the land by agreement. *West Hartford v. Talcott*, supra. But the law does not require the performance of a useless and futile act. 6 Nichols, Eminent Domain (3d Ed.) § 24.62[1], p. 58; see *Trinity College v. Hartford*, 32 Conn. 452, 481; *West Hartford v. Talcott*, supra. In seeking to prevent condemnation, the owner of property demonstrates his inability to agree within the meaning of the statute. *Trinity College v. Hartford*, supra; 6 Nichols, op. cit. § 24.622.

In 1959, Haik had informed the plaintiff that the land was not available for purchase by the town and that he intended to litigate fully any attempt to acquire his land by condemnation. In 1960, both defendants joined with others in seeking an injunction to restrain the plaintiff from acquiring their land as a school site. See *Baker v. Kerrigan*, 149 Conn. 596, 183 A.2d 268. Prior to the present action, Haik reiterated to a town selectman his views on the acquisition of the land. These facts indicate an absolute opposition to acquisition of the property which is tantamount to a refusal to negotiate or sell at any price, and show that the statutory requirement of inability to agree has been met. General Statutes § 48-12; *Trinity College v. Hartford*, supra. It is true that no conversations were held with Alice, but this is not controlling because she demonstrated her opposition

by joining in the injunction proceeding. Moreover, where an offer to one joint owner as to his undivided interest in the property fails, there is no necessity for further negotiations with the other owner. *Commonwealth v. Cardinal Hill Nursery, Inc.*, 343 S.W. 2d 842, 844 (Ky.); *Aronoff v. Dallas*, 316 S.W. 2d 302, 307 (Tex. Civ. App.); 6 Nichols, op. cit. § 24.621[1].

The defendants have also appealed from the order granting to the plaintiff the right of immediate possession. Section 48-16 of the General Statutes provides that the court may, when satisfied that the public interest will be prejudiced by delay, direct that the petitioner be permitted to enter immediately upon the property to be taken and devote it temporarily to the public use specified in the petition, upon deposit with the court of a sum fixed by it. The possession contemplated under the statute is temporary and covers only the period during which the condemnation proceedings are pending. *Trumbull v. Ehrsam*, 148 Conn. 47, 52, 166 A.2d 844. The legality of the order granting immediate possession can be successfully challenged only by showing that the trial court could not be satisfied, under the circumstances, that the public interest would be prejudiced by delay. The finding, which is not subject to correction, clearly supports the action of the court.

There is no error.

In this opinion the other judges concurred.

APPENDIX "B"

General Statutes of Connecticut

Sec. 48-12. Procedure for Condemning Land

The procedure for condemning land or other property for any of the purposes specified in sections 48-2, 48-3, 48-4, 48-8 and 48-9, if those desiring to take such property cannot agree with the owner upon the amount to be paid him for any property thus taken, shall be as follows: The comptroller in the name of the state, county commissioners in the name of the county, any town, school district, or trustees or directors of any state institution in the name of the state, may prefer a petition to the superior court for the county in which the property lies

or to a judge of said court if said court is not in session praying that such compensation may be determined, and, if such petition is brought under Section 48-8, that a site be fixed; which petition shall be accompanied by a summons signed by competent authority, to be served as process in civil actions before said court, notifying the owner of the property to be taken, and all persons interested in such property, to appear before said court or such judge. If such petition is brought by the comptroller or by the trustees or directors of any state institution in the name of the state, said court or such judge shall refer the determination of the amount of damages to a state referee as provided in Section 48-10. If such petition is brought by the county commissioners in the name of the county or by any town or school district, said court or such judge shall appoint a committee of three disinterested persons who shall be sworn before commencing their duties. Such state referee or committee, after giving reasonable notice to the parties, shall view the property in question, hear the evidence, ascertain the value, assess just damages to the owner or parties interested in the property so proposed to be taken and report his or its doings to said court or such judge. In the case of a school district, such committee may, if it does not approve the site, fix another site on land of the same owner and proceed as aforesaid. Said court or such judge may accept such report or may reject it for irregular or improper conduct by the state referee or committee in the performance of his or its duties. If the report is rejected, the court or judge shall appoint another committee or state referee, who shall proceed in the same manner as the first committee or state referee was required to proceed. If the report is accepted such acceptance shall have the effect of a judgment in favor of the owner of the property against the petitioner for the amount of the assessment made by the committee or referee, as the case may be, and, except as otherwise provided by law, execution may issue therefor. Said court or such judge shall make any order necessary to protect the rights of all parties interested. Except as provided in Section 48-16, such property shall not be used or enclosed by the petitioner until the amount of such judgment has been paid to the party to whom it is due, or deposited for his use with the treasurer of the county in which the property lies and, upon such payment or deposit, such property shall become the property

of the petitioner. The expenses and costs of such hearings shall, in the case of a petition brought by the state, be audited and allowed by the comptroller and paid by the state upon his order, and in all other cases shall be taxed by the court or judge and paid by the town, school district or county, as the case may be. (1949 Rev., S. 7181.)

APPENDIX "C"

General Statutes of Connecticut

Sec. 48-16. Possession of Property Pending Condemnation Proceedings

When it appears to the satisfaction of the court at any stage of condemnation proceedings brought under Section 48-6 and 48-12 that the public interest will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon the deposit with the court of a sum to be fixed by the court upon a notice to the parties of not less than five days and such sum when so fixed and paid shall be applied, so far as it may be necessary for that purpose, to the payment of any award that may be made with interest thereon from the date of the entry of the petitioner upon such real property, and the costs and expenses of the proceedings, and the residue, if any, returned to the plaintiff. If the petition is dismissed, or no award is made, or the proceedings are abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceedings, such damages to be ascertained by the court, or a committee to be appointed for that purpose, and if the sum so deposited is insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgement shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgement in the superior court; and the possession of the property shall be restored to the defendant. (1949 Rev., S. 7182)

APPENDIX "D"

GENERAL STATUTES OF CONNECTICUT

SEC. 48-15. INSPECTION AND TESTING PRIOR TO CONDEMNATION

Upon petition of a condemning authority, either before or after the institution of a condemnation proceeding and after reasonable notice to the property owner or owners affected the superior court or court of common pleas or any judge thereof may authorize such condemning authority to enter upon and into land and buildings sought or proposed for public uses for the purpose of inspection, survey, borings and other tests. Such condemning authority shall be responsible to the owner or owners of such property for any damage or injury caused by such entrance and use, and such court or judge may require the filing of a bond or deposit of surety to indemnify the owner or owners of property for such damage. This section shall not limit or modify rights of entry upon private property otherwise provided for by law. (1955, S. 2968d.)

BRIEF FOR THE RESPONDENT IN OPPOSITION

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 309

HAIK KAVOOKJIAN, *et al.*

Petitioners

v.

TOWN OF DARIEN

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Connecticut Supreme Court of Errors is reported in the Connecticut Law Journal, Vol. 25, No. 51, June 16, 1964 and is printed as Appendix A to the petition for certiorari. Opinions of the Connecticut Superior Court dated September 26, 1962 and May 29, 1963 are printed at pages 7 and 38 of the Record.

Jurisdiction.

Petitioners claim that jurisdiction exists under 28 U. S. C., 1257(3), which provides that the final judgment of the highest court of a state may be reviewed by the Supreme Court:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repug

nant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Respondent submits that there has been no decision on a federal question by any of the courts below which could provide the jurisdictional basis for a writ of certiorari.

Questions Presented.

1. Was a federal question raised by the petitioners and decided by the court below so as to provide a jurisdictional basis for the issuance of a writ of certiorari?

2. Should certiorari be granted to review a state court decision construing a state statute where no claim is made in the petition that the statute is unconstitutional, either on its face or in its application?

3. Should certiorari be granted to review a state trial judge's findings of fact which were reviewed and left undisturbed by a state supreme court where no claim is made in the petition that the findings were the result of a denial of procedural due process?

Statutes Involved.

The statutes involved are 28 U. S. C. § 1257(3), set forth above, and §§ 48-12 and 48-16, Connecticut General Statutes (1958 Rev.) (Pet. App. B and C).*

The Constitutional provision involved is the Fourteenth Amendment.

* References to the appendices to the petition for certiorari are abbreviated "Pet. App."; references to the record in the Connecticut Supreme Court of Errors are abbreviated "R." followed by a page number.

Statement.

This is an action to condemn land for a public elementary school. It is a strictly local controversy in which no federal issues were asserted prior to petitioners' attempt to do so in the petition for certiorari.

In June, 1959, the Town of Darien, Connecticut, sought to purchase approximately one-third of a fourteen acre tract of land owned by petitioners, Mr. and Mrs. Haik Kavookjian, as tenants in common. When contacted by the Town, Mr. Kavookjian refused to sell and wrote the Town that he would join with others "in opposing, contesting and litigating" the Town's efforts to acquire the property.

Thereafter the petitioners and some of their neighbors brought a taxpayers' suit in which they challenged the Town's choice of a site and also its need for the proposed school and attempted to enjoin the Town from acquiring petitioners' land either by purchase or by condemnation.

While the taxpayers' suit was pending, the Town commenced this condemnation action. Petitioners defended in part by claiming that the Town had failed to negotiate with Mrs. Kavookjian for the purchase of her interest in the land and that such negotiation was a prerequisite to condemnation under the Connecticut statute (Sec. 48-12, Conn. Gen. Stats.; Pet. App. B).

Construing Section 48-12, the Supreme Court of Errors held that the statute requires a condemning authority to make reasonable efforts to obtain property by purchase before instituting condemnation proceedings. However, in this case it was conceded that Mr. Kavookjian had refused to sell and that Mrs. Kavookjian had joined him in opposing the Town in the taxpayers' suit. The Court therefore held that the Connecticut condemnation statute did not

requiring the Town to perform the futile act of negotiating separately with Mrs. Kavookjian (Pet., App. A).

At no time during the proceedings below did petitioners claim that the construction of Section 48-12 which was contended for by the Town and accepted by both the trial court and the Supreme Court of Errors, would render the statute repugnant to the Constitution, treaties or laws of the United States.

In July, 1962, final judgment was entered in favor of the Town in the taxpayers' suit.** The Town subsequently made application to the Superior Court for immediate possession of petitioners' property as authorized by Section 48-16 of the Connecticut General Statutes (Pet., App. C). After a three day trial, the Superior Court made extensive findings of fact, concluded that the public interest of the Town would be prejudiced by delay, and granted the Town's application for immediate possession (R. 11-19, 17, 78). Petitioners appealed, thereby automatically staying execution of the immediate possession order.

No claim was made to the Supreme Court of Errors that the finding of the Superior Court on the question of prejudice to the public interest amounted to a denial of due process or otherwise infringed any federally protected rights of the petitioners (Defendants' Appeal, R. 9; Assignment of Errors, R. 19-20).

While the appeal from the immediate possession order was pending, the condemnation proceedings were tried on

* As a matter of substantive state law there is nothing novel about this decision. Many states have condemnation statutes similar to the Connecticut statute, and *all* have reached the same result where one of two co-owners refuses to sell or whose ownership seeks to enjoin condemnation. *See* Annot., 8 A. L. R. 471 (1920); 18 *Am. Jur.*, Eminent Domain, §319, p. 962-3 (1938); 6 Nichols, *Eminent Domain*, §24.62, 24.621-1, 24.622, pp. 58, 62-3 (1954) and cases cited therein.

** *Ballas v. Kerrigan*, 149 Conn. 500, 181 A. 2d 208 (1962).

the merits before a state referee. The report of the referee was accepted by the trial court, which entered judgment for the Town and appointed commissioners to determine the amount of compensation to be paid. Petitioners' appeal from this decision on the merits was consolidated with the earlier appeal from the order granting immediate possession. The petition seeks review of the decision of the Supreme Court of Errors on both appeals.

Proceedings to fix the damages due petitioners as just compensation for the taking of their property have not yet commenced. Petitioners, of course, make no claim that they will hereafter be denied the just compensation required under the Fourteenth Amendment and under state law.

ARGUMENT.

I.

There is no jurisdictional basis for the petition because no federal question was raised or decided below.

No claim was made at any time during any of the proceedings below that either the statutory construction question (petition, points A and B) or the factual issue as to whether delay in granting possession to the Town would be prejudicial to the public interest (petition, point C) directly or indirectly involved any federal question. Petitioners' own record references in the section of their petition entitled "Basis for the Federal Questions" readily demonstrate this jurisdictional defect. The opinion of the Supreme Court of Errors is likewise devoid of any intimation that the court was consciously passing on a federal question.

Certiorari will not issue unless a federal question has been presented to and decided by the state court. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, 653-5 (1897); *New York Central Railroad Company* v. *New York*, 186 U. S. 269, 273 (1902); *Bouce* v. *Scott*, 233 U. S. 658, 664-5 (1914).

> "... the jurisdiction of this Court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." *Oxley Stave Company* v. *Butler County*, 166 U. S. at 655.

II.

Certiorari should not issue to review the construction of a State statute by a State court.

Respondent submits that despite petitioners' occasional use of the term "due process," the petition for certiorari does not raise a single recognizable federal question. Petitioners, in points A and B of their petition, have merely taken the statutory construction arguments they made to the Connecticut courts, tacked on the words "due process of law" and submitted them to this Court as "constitutional" questions.

No claim is made in the petition that Section 48-12 of the Connecticut General Statutes, either on its face or as construed by the Supreme Court of Errors, is unconstitutional.

No claim is made in the petition that either the officials of the Town of Darien or the courts of the State of Connecticut have denied petitioners any specific right, privilege

or immunity which is theirs by virtue of the Constitution, treaties or statutes of the United States.

No theory is advanced upon which petitioners might predicate a claim that Connecticut condemnation procedures violate the due process clause of the Fourteenth Amendment to the United States Constitution, and no case is cited, either federal or state, which either directly or by analogy would support such a proposition if it had been presented.*

III.

Certiorari should not issue to review a simple finding of fact.

In point C of their petition for certiorari, petitioners seek a review of the refusal of the Connecticut Supreme Court of Errors to modify findings of fact by the Superior Court that the Town would be prejudiced by further delay in obtaining possession of petitioners' property (Findings Nos. 5, 32 and 49, R. 12, 15 and 17; Pet. App. A).

This case does not fall within any of the exceptions to the general rule that the Supreme Court will not review mere questions of fact. *Fry Roofing Co. v. Wood*, 344 U. S. 157, 160 (1952); *Grayson v. Harris*, 267 U. S. 352, 358 (1924); *Tallahdy Power Co. v. Rio Grande Western Railway Co.*, 175 U. S. 639, 645-647 (1899).

* The only federal case petitioners cite holds that the United States is an indispensable party to an action to condemn Indian lands. *Minnesota v. United States*, 305 U. S. 382 (1938).

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WARREN W. EGINTON,
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August 17, 1964.